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No. 93-754

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

CHRISSY F., By Her Next Friend And
Guardian Ad Litem, Donna Medley
Petitioner,

vs.

SEBE DALE, JR. Individually and as Chancellor for the Tenth Chancery Court District of Mississippi, GARLAND UPTON, Individually and as Referee of the Marion County Youth Court, PHILLIP BROADHEAD and FRED COOPER,
Respondents,

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF LEGAL SERVICES FOR CHILDREN IN SUPPORT OF CHRISSY F.'S PETITION FOR A WRIT OF CERTIORARI

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MOTION OF LEGAL SERVICES FOR CHILDREN FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Legal Services for Children ("LSC") hereby moves for leave to file the attached brief amicus curiae pursuant to Rule 37 of the Rules of this Court. Petitioners have consented to the filing of this brief. Counsel for respondents, however, has been unwilling to consent to the filing of this brief.

This case raises important questions concerning the scope of the Rooker-Feldman doctrine and the uncertainty of its application in the lower courts. Amicus submit that the holding of the court of appeals improperly extends the perimeters of the Rooker-Feldman doctrine. If the judgment of the court of appeals is allowed to stand, under the facts of this case, any litigant will be effectively denied a reasonable opportunity to bring their federal civil rights claims in either federal or state court. This case also involves critical questions regarding the constitutional rights of children in child abuse adjudications. All too often, these children are subjected to repeated violations of their due process rights and, because they lack meaningful legal representation, are helpless to object or take remedial legal action. Amicus contend that these children are deprived of meaningful access to state court and are entitled to have their constitutional rights vindicated in the federal courts.

Amicus is committed to safeguarding the rights of children and has extensive experience in representing children, especially in juvenile court proceedings.

Accordingly, amicus respectfully move for leave to file the attached brief amicus curiae in order to present the Court with our views on this important case.

Respectfully submitted,

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUIT COURTS AND DISTRICT COURTS ARE SPLIT OVER THE SCOPE OF THE ROOKER-FELDMAN DOCTRINE 2

A. The Rooker-Feldman Doctrine 3

B. The Lower Courts Are in Disagreement About the Appropriate Scope of the Doctrine 5

II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER CHILDREN WHO ARE APPOINTED LEGAL COUNSEL IN CHILD ABUSE PROCEEDINGS, PURSUANT TO STATE STATUTE, ARE ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL 10

A. Effective Assistance of Counsel Is a Critical Component of a Child's Right to Access to the Courts in a Child Abuse Proceeding 11

B. Children in Child Abuse Proceedings Often Receive Incompetent Legal Representation 14

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Berman v. Florida Bd. of Bar Examiners, 794 F.2d 1529 (11th Cir. 1986) 5

Carbonell v. L.A. Dept. of Health & Human Services, 772 F.2d 185 (5th Cir. 1985) 8

Chrissy F. By Medley v. Ms. Dept. of Public Welfare, 995 F.2d 595 (5th Cir. 1993) . . . . . passim

Chrissy F. By Medley v. Mississippi DPW, 780 F.Supp. 1104 (S.D.Miss. 1991) 9,10,11,19

Czura v. Supreme Court of South Carolina, 813 F.2d 644 (4th Cir. 1987) 5

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 1,3,4,5

Elks National Foundation v. Weber, 942 F.2d 1480 (9th Cir. 1991) 7

Gauthier v. Continental Diving Services 831 F.2d 559 (5th Cir. 1987) 7

Greening v. Moran, 953 F.2d 301 (7th Cir. 1992) 7

Guess v. Board of Medical Examiners of State of N.C., 967 F.2d 998 (4th Cir. 1992) 7

Haring v. Prosise, 462 U.S. 306 (1983) 6,10

Hollins v. Wessel, 819 F.2d 1073 (11th Cir. 1987) 7

Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592 (1988) 1

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435 S.E.2d 162 (1993) 12,13,16,18

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(8th Cir. 1990) 5

Leaf v. Supreme Court of State of Wis.,
979 F.2d 589 (7th Cir. 1992) 7,8

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465 U.S. 75 (1984) 7

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(10th Cir. 1984) 5

Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) 6,10

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263 U.S. 413 (1923) . . . . . passim

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917 F.2d 620 (1st Cir. 1990), cert. denied,
____U.S. ____, 112 S.Ct. 865 (1992) 8

Schumacker v. Nix, 965 F.2d 1262 (3rd Cir. 1992) 5

Stern v. Nix, 840 F.2d 208 (3rd Cir. 1988) 8

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(2d Cir. 1986), rev'd on other grounds,
481 U.S. 1 (1987) 8,9

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(D. Puerto Rico 1992) 8

Valenti v. Mitchell, 962 F.2d 288 (3rd Cir. 1992) 8

Wood v. Orange County, 715 F.2d 1543
(11th Cir. 1983) 7,10

Worldwide Church of God v. McNair,
805 F.2d 888 (9th Cir. 1986) 7

RULES, STATUTES AND CODES

U.S. Constitution
Amendment XIV 10

28 U.S.C. §1257 4,9

42 U.S.C.
§1983 9
§§5101-5106 14,15
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INTEREST OF AMICUS

Legal Services for Children, Inc. ("LSC"), is a private, nonprofit law firm founded in 1975 solely to represent minors in juvenile court and other proceedings affecting the health, education, and welfare of children. LSC is concerned about this case because we strongly believe that federal court access is essential to ensure that children have some means of compelling states to enforce the due process rights guaranteed by the 14th Amendment. LSC is based in San Francisco, California, and has participated in numerous cases affecting children, including Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592 (1988).

SUMMARY OF ARGUMENT

The Rooker-Feldman doctrine has produced a significant split not only in the circuits but among the individual courts within the circuits about the interpretation and the application of this Court's "inextricably intertwined" test set forth in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Further, the Fifth Circuit's decision in this case expands the perimeters of Rooker-Feldman farther than any other circuit, and beyond the boundaries set by this Court's precedents. Moreover, amicus submits that under the precedent established by this Court, the Rooker-Feldman doctrine does not preclude federal subject matter juris-diction when the petitioner did not have a full and fair opportunity to litigate her claims in state court, and when the petitioner is not seeking to overturn the state court's judgment but merely trying to secure her right to meaningful access to the courts.

This case is particularly compelling given the fact that it is capable of repetition thousands of times over again. It should be emphasized that the only way abused children can seek legal protection is through invoking certain state proceedings (i.e., juvenile abuse adjudications, guardianships or divorce and custody actions). Thus, most abused children will probably be involved in a state proceeding of some kind. Under the holding in Chrissy F. By Medley v. Ms. Dept. of Public Welfare, 995 F.2d 595 (5th Cir. 1993)(hereinafter "Chrissy III") these children will be completely barred from filing civil rights claims in federal court

whenever their due process rights are violated despite the fact they had no meaningful legal representation in state court. Moreover, given the fact that several commentators have noted that many children in abuse adjudications today are receiving inadequate legal representation, if they receive any legal representation, the holding in Chrissy III could be devastating to thousands of children.

Amicus asserts that the fundamental flaw in Chrissy III is a failure to understand this crucial point: there is no one single factor that is more important to the life of a child in a child abuse adjudication than meaningful assistance of counsel. When children in abuse adjudications are deprived of meaningful assistance of counsel they cannot thereafter sue their attorneys for malpractice, file a complaint with the state bar or assume their own legal representation. In addition, because child abuse adjudications are not open to the public, it is highly unlikely that an outside third party could know a child needed legal assistance. Thus, children who are denied meaningful assistance of counsel are profoundly helpless in the face of due process violations inflicted by the very institution that is charged with their protection: the state courts. Amicus contends that these children are effectively denied their constitutional right to access to the courts. Therefore, amicus strongly believes that a child's constitutional right to access to the courts requires that children are afforded legal representation at all stages of a child abuse proceeding. At the very least, where a state statute provides for the appointment of counsel for the child in child abuse proceedings, these children should be entitled to effective assistance of counsel.

Accordingly, this Court should grant the Petition to clarify the application of the Rooker-Feldman doctrine. Moreover, this Court should grant the Petition to decide whether children who, pursuant to state statute, are appointed counsel in child abuse adjudications, are entitled to effective assistance of counsel.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION BECAUSE THE CIRCUIT COURTS ARE SPLIT OVER THE SCOPE OF THE ROOKER-FELDMAN DOCTRINE.

A. The Rooker-Feldman Doctrine.

Rooker-Feldman takes its name from two prior decisions of this Court: District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) and Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). In essence, the doctrine states that the federal district court, as a court of original jurisdiction, has no authority to conduct appellate review of the final determinations of a state court in judicial proceedings.

In Rooker v. Fidelity Trust Co., plaintiffs brought a suit to have a judgment of a state court declared void because it was violative "of the contract clause of the Constitution of the United States and the due process of law and equal protection clauses of the Fourteenth Amendment..." Id. at 414. The district court held that it lacked subject matter jurisdiction and dismissed the case. This Court held that as long as the constitutional issues "actually arose" and a "full hearing was had therein...no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character..." for to do so would be an impermissible exercise of appellate jurisdiction. Id. at 415-416.

The Court reaffirmed Rooker in District of Columbia Court of Appeals v. Feldman. In Feldman, the Committee on Admissions of the District of Columbia Bar (the "Committee") had denied plaintiffs Feldman and Hickey admission to the D.C. bar under a rule which restricted admission to ABA-approved law school graduates. Plaintiffs filed separate actions in the District of Columbia Court of Appeals seeking orders allowing for a waiver of the rule or permission to sit for the bar exam. The Court of Appeals affirmed the Committee's decision. Thereafter, plaintiffs filed separate suits in the federal district court alleging that the D.C. Court of Appeals had violated their federal rights. The district court dismissed both suits, citing lack of subject matter jurisdiction. The Court of Appeals reversed on the ground that the appellants' waiver petitions emanated from proceedings that were not judicial.

This Court noted that the District Court properly acknowledged that it was without authority to review final determinations

of the District of Columbia Court of Appeals. Id. at 476. After determining that the proceedings before the District of Columbia Court of Appeals were judicial in nature, the Court concluded that to the extent Hickey and Feldman sought federal review of the District of Columbia Court of Appeals' denial of their petitions for waiver, the U.S. District Court lacked subject matter jurisdiction. The proper procedure was for Hickey and Feldman to seek review in this Court under 28 U.S.C. §1257.

The Court noted that, since it will not decide federal constitutional issues raised before it for the first time, "[i]t is possible that review of a state court decision by this Court could be barred by a petitioner's failure to raise his constitutional claims in the state courts." Id. at 482 n.16. The mere fact that the plaintiff failed to raise constitutional claims in state court would not necessarily mean, however, that the lower federal courts had subject matter jurisdiction:

> "If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do." Id.

The Court then noted that by failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court. Id. at 482 n.16. Thus, federal subject matter jurisdiction exists to the extent that the federal claims are not inextricably intertwined with the state court judgment. If, however, this Court lacks certiorari jurisdiction over federal claims because the plaintiff failed to raise them in state court, and the claims are held to be "inextricably intertwined" with the state court proceedings the plaintiff is precluded from bringing constitutional claims in either federal or state court.

The Court did not set forth a clear formula for determining when federal claims are "inextricably intertwined" with state court proceedings. General challenges to state bar admission rules were exempted because they did not require federal review of a state

court judgment. Id. at 486. In contrast, a "particular" challenge would require review of the constitutionality of a judgment "denying a particular application for admission to the Bar." Id. at 485.

This Court concluded that to the extent Hickey and Feldman mounted a general challenge to the constitutionality of the bar rules the District Court did have jurisdiction.

Lower courts have subsequently grappled with the definition of "inextricably intertwined"; its meaning remains unclear today.

B. The Lower Courts Are in Disagreement About the Appropriate Scope of the Doctrine.

As noted below, the lower courts are in disagreement about the scope and interpretation of the Rooker-Feldman doctrine. Some courts, applying what appears to be a strictly literal interpretation of Feldman, distinguish only between a "general challenge" to a statute and review of a particular state court judgment. Other courts have suggested that the Feldman doctrine is not necessary and use principles of res judicata instead. Still others have incorporated claim preclusion principles into the Feldman doctrine itself. Finally, some courts have developed their own exceptions to the Feldman doctrine.

Several circuits have applied a strictly literal interpretation of the Feldman distinction between "general challenges" and requests to review "individual applications."[1]

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[1] See Schumacker v. Nix, 965 F.2d 1262, 1266 n.6 (3rd Cir. 1992) (Rooker-Feldman no jurisdictional obstacle where complaint presents a federal constitutional challenge to state bar rule); LaNave v. Minnesota Supreme Court, 915 F.2d 386, 387 (8th Cir. 1990) (federal court lacks jurisdiction over constitutional challenge to state court decision regarding state bar rules which required plaintiffs to be graduates of ABA-approved law school); Czura v. Supreme Court of South Carolina, 813 F.2d 644, 646 (4th Cir. 1987) (district court lacked jurisdiction over civil rights action brought by disbarred attorney where federal action was actually an attack on order of disbarment in his particular case); Berman v. Florida Bd. of Bar Examiners, 794 F.2d 1529, 1530 (11th Cir. 1986) (no subject matter jurisdiction where attorney's claim was a challenge to denial of his application for admission to bar in state court judicial proceeding); Razatos v. Colorado Supreme Court, 746 F.2d 1429, 1432-1433 (10th Cir. 1984) (acknowledging "inextricably intertwined" provides

In contrast to the rigid approach used by the courts cited above, other courts have essentially dispensed with the Rooker-Feldman doctrine altogether, and instead applied res judicata ("claim preclusion"). In Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), vacated on other grounds, 477 U.S. 902 (1986) the Ninth Circuit stated:

> "Faced with the task of deciding our power to review constitutional issues which arise from a state court proceeding, we view the res judicata requirement of full and fair opportunity to litigate, and the Feldman 'inextricable intertwined' barrier to federal jurisdiction as two sides of the same coin." Id.

The Ninth Circuit cited Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983) for the proposition that in a section 1983 action, collateral estoppel effect will not be given to a state court conclusion where the complaining party did not have full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or unwillingness to protect federal rights.

In a significant footnote, the court explained:

> "If the procedural posture of the state court action had, for some reason, altogether prevented the plaintiffs from raising federal constitutional claims in their petition for rehearing, the federal district court would have had original jurisdiction over those claims. We are loathe to grant less constitutional protection where plaintiffs have responsibly exercised an opportunity to raise their claims and have been turned away from the state tribunal without so much as an explanation." Id. at 1473 n.3. (Citation omitted.)

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no "bright line rule" and finding no subject matter jurisdiction over action to review decision of Colorado Supreme Court suspending plaintiff); Lowrie v. Goldenhersh, 716 F.2d 401, 407 (7th Cir. 1983) (federal subject matter jurisdiction exists where attorney's complaint seeking admission to Illinois bar could be considered a general challenge).

Thus, a strict interpretation of Feldman might mean that a plaintiff who was denied a full and fair opportunity to litigate claims would be effectively precluded from presenting those claims in either state or federal court.[2]

Unlike either of the approaches discussed above a number of circuits and district courts have integrated principles of res judicata and collateral estoppel (or "claim and issue preclusion") into the Rooker-Feldman doctrine.

In Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983) the court of appeals noted this limitation of Feldman:

> "The rule can apply only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings.... Moreover, an issue that plaintiff had no reasonable opportunity to raise cannot properly be regarded as part of the state case. In Feldman's language, the issue that such a plaintiff asks the federal court to decide is not 'inextricably intertwined' with the state court's judgment." Id. at 1547.

Thus, if the plaintiff did not have a fair opportunity to litigate his claims in state court and Rooker-Feldman bars him from bringing up those issues in federal court, he is effectively precluded from bringing his claims in any court.[3]

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[2] Other courts have also applied a res judicata analysis. See, e.g., Greening v. Moran, 953 F.2d 301, 305 (7th Cir. 1992) (cites to Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) instead of citing Feldman to dispose of claims seeking review of state court judgment); Gauthier v. Continental Diving Services, 831 F.2d 559, 561 (5th Cir. 1987) (Rooker-Feldman close if not identical to the principle that a federal court must give full faith and credit to a state court judgment and expressly declining to give greater deference to a state court judgment than a court of the state in which the judgment was rendered).

[3] See also, Guess v. Board of Medical Examiners of State of N.C., 967 F.2d 998, 1004 (4th Cir. 1992); Leaf v. Supreme Court of State of Wis., 979 F.2d 589, 599 (7th Cir. 1992); Elks National Foundation v. Weber, 942 F.2d 1480, 1484 (9th Cir. 1991); Hollins v. Wessel, 819 F.2d 1073,1074 (11th Cir. 1987); Worldwide Church of God v. McNair, 805 F.2d 888,892 (9th Cir. 1986).

Still other courts have applied another principle borrowed from res judicata--that claim preclusion does not apply to litigants who were not parties in the state litigation.[4]

Courts within the First, Third and Fifth Circuits have adopted other tests for determining when a federal claim is inextricably intertwined with a state court judgment. In applying the Rooker-Feldman doctrine courts in the Third Circuit look at the "nature of the relief sought in federal court."[5] In contrast to the Third Circuit, courts in the First and Fifth Circuits have explicitly rejected the "nature or basis of the desired relief" standard and instead look to the "realistic... nature of the underlying claim" in determining when federal claims are inextricably bound with state court judgments.[6]

Finally, some courts have allowed claims that were considered "separable from and collateral to the merits of the state court action." In Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2nd Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987), Texaco sought a federal court order enjoining the enforcement of a state damage award and alleged that the Texas lien and supersedeas bond provisions violated its federal constitutional rights. The Second Circuit held that it had jurisdiction over Texas' due process and equal protection claims because those claims had never been raised before the state court. The court

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[4] See Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 629 (1st Cir. 1990), cert. denied, ___ U.S. ___, 112 S.Ct. 865 (1992); Valenti v. Mitchell, 962 F.2d 288, 297 (3rd Cir. 1992); Leaf v. Supreme Court of State of Wis., 979 F.2d 589, 597-98 (7th Cir. 1992), cert. denied, ___ U.S. ___, 113 U.S. 2417 (1993).

[5] See Valenti v. Mitchell, 962 F.2d 288, 297 (3rd Cir. 1992); Centifanti v. Nix, 865 F.2d 1422, 1429 (3rd Cir. 1989); Stern v. Nix, 840 F.2d 208, 212 (3rd Cir. 1988).

[6] See Carbonell v. L.A. Dept. of Health & Human Services, 772 F.2d 185, 189 (5th Cir. 1985) ("...Feldman (citation omitted) teaches that the nature of the underlying claim, not the nature or basis of the desired relief, directs the answer to the appellate versus original jurisdiction inquiry."); U.S. Industries Inc. v. Laborde, 794 F.Supp. 454, 464 (D. Puerto Rico 1992).

also noted that enforcement of the lien and bond provision would deny Texaco "its right of appeal of any meaning . . ." Id. at 1157. The court categorically rejected the argument that Rooker-Feldman precludes jurisdiction over issues which a party could have raised in state court but chose to withhold because:

> "... the theory would read 28 U.S.C. §1257 to severely impair, perhaps negate, a litigant's right to gain equitable or other relief under 42 U.S.C. §1983, Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), since most claims under §1983, especially requests to enjoin ongoing state proceedings, could be raised in a related state proceeding. To relegate the §1983 claimant in such cases to the state court would ignore Congress' purpose in adopting that statute. Section 1983 was intended to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Accordingly, it is settled law that a §1983 litigant need not first seek to vindicate his federal claims in state court before turning to a federal court for relief." (Citations omitted.) Id. at 1144.

This Court reversed Pennzoil on abstention grounds implicitly finding subject matter jurisdiction. Moreover, in concurring opinions, a majority of the Court agreed that Rooker-Feldman did not prohibit jurisdiction. Significantly, Justice Brennan, the author of Feldman, noted that:

> "Texaco filed the §1983 action only to protect its federal constitutional right to a meaningful opportunity for appellant review, not to challenge the merits of the Texas suit. Texaco's federal action seeking a stay of judgment pending appeal is therefore an action 'separable from and collateral to' the merits of the state-court judgment." Id. at 21.

Thus, claims should not be dismissed merely because they require some consideration of the merits of the state court judgment. Instead, courts should look to the purpose of bringing the action.

Chrissy III is a tragic decision which has effectively prohibited a young child from obtaining the protection of the courts. Amicus maintains that the decision in Chrissy III amply illustrates the concerns expressed in Wood and in Robinson regarding the consequences to those who are denied a fair hearing at the state level and are, thereafter, shut out of federal court by the Rooker-Feldman doctrine. Petitioner never received a fair chance to litigate any claim in state court. This child not only had no legal representation in the Chancery Court--she was not even a party. Because of her age and her standing she could not possibly present any claims in the Chancery Court. No record was made of those proceedings, and no appeal could be taken. As the district court found, the Youth Court adjudication was a sham which "fell woefully short of those basic features which mark an adequate adjudicatory proceeding." 780 F.Supp. at 1127.

Moreover, amicus contends that Chrissy III violates this Court's own precedents. In Haring v. Prosise, 462 U.S. 306, 313, 103 S.Ct. 2368, 2373, 76 L.Ed.2d 595 (1983) this Court stated that collateral estoppel effect would not be given to a state court opinion where the complaining party did not have a full and fair opportunity to litigate a claim in state court or where the state court demonstrated inability or unwillingness to protect federal rights. To do otherwise would render the 14th Amendment superfluous and undermine the very purpose of section 1983.

II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER CHILDREN WHO ARE APPOINTED LEGAL COUNSEL IN CHILD ABUSE ADJUDICATIONS, PURSUANT TO STATE STATUTE, ARE ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL.

Amicus strongly believes that children must be represented by a competent attorney at all stages of a child abuse adjudication. Had Petitioner been represented by competent legal counsel there would have been no need to seek relief in the federal court. As noted above, amicus asserts that the fundamental flaw in Chrissy III is a failure to understand that there is no factor more important in a child abuse adjudication than meaningful assistance of

counsel.[7] When children in abuse adjudications are deprived of meaningful assistance of counsel they cannot thereafter sue their attorneys for malpractice, file disciplinary complaints or assume their own legal representation. Thus, children who are denied meaningful assistance of counsel are profoundly helpless in the face of due process violations inflicted by the very institution that is charged with their protection: the state courts. Amicus contends that these children are effectively denied their constitutional right to access to the courts.

A. Effective Assistance of Counsel Is a Critical Component of a Child's Right to Access to the Courts in a Child Abuse Proceeding.

The district court's statement that, although the child was a victim of a "sham" court proceeding, "[e]ach of the parties, at all times, appears to have had the best interests of Chrissy in mind" (780 F.Supp. at 1131), reflects the discredited idea that due process protections are not necessary for children in juvenile proceedings because the state will adequately protect the child. The facts of this case and many others show that is not true. That notion was disposed of in the landmark case of In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

In re Gault declared that "...neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. at 13. In re Gault established that children in juvenile delinquency proceedings were entitled to basic due process guarantees including the right to counsel. After the Court discussed the original intent of the early child advocates to create an informal court system where the state, acting in its role as parens patriae, would protect the best interests of the child, the Court explained:

> "The absence of substantive standards has not necessarily meant that children receive careful,

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[7] In Chrissy III the Fifth Circuit stated that Chrissy had "knowledgeable attorneys." Chrissy III, 995 F.2d at 599. This observation is directly contradicted by the findings of the District Court. See Chrissy F. By Medley v. Mississippi DPW, 780 F.Supp. 1104, 1114 (S.D.Miss. 1991); See also TT at 244, 291-93, 766-70.

> compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness...Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." Id. at 20-21.

Interestingly, the opinion cited a portion of the President's National Crime Commission Report which stated:

> "'Fears have been expressed that lawyers would make juvenile court proceedings adversary. No doubt this is partly true, but it is partly desirable. Informality is often abused. The juvenile courts deal with cases in which facts are disputed and in which, therefore, rules of evidence, confrontation of witnesses, and other adversary procedures are called for. They deal with many cases involving conduct that can lead to incarceration or close supervision for long periods, and therefore juveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when disposition decisions are made.'" Id. at 38 n.65.

Amicus submits that the same concerns expressed by the Court in In re Gault apply to juvenile court abuse proceedings. The similarity of problems juveniles encounter in the criminal system and in the child protection courts was implicitly recognized in the recent West Virginia case, In re Jeffrey R.L. In In re Jeffrey R.L., __ W.Vir. __, 435 S.E.2d 162 (1993) a child's guardian ad litem argued that the Supreme Court of West Virginia should adopt an "effective assistance of counsel standard" for children in child abuse adjudications precisely because child abuse

proceedings have "quasi-criminal overtones."[8] For example, in abuse proceedings, as in criminal proceedings, no amount of monetary compensation through a negligence suit for malpractice can adequately compensate a child who has been a victim of incompetent legal representation. Clearly, as in criminal cases, the child's liberty is at stake. Children in abuse proceedings can be committed to locked psychiatric units, long-term residential treatment centers or forced to live in other institutionalized settings apart from family and friends. Finally, most critically, ineffective assistance of counsel could allow a child to suffer severe physical, sexual or emotional injury and even death. One commentator has reported that on a yearly basis over one million children suffer demonstrable harm as a result of abuse and neglect, and over 1,100 children die as a consequence of such abuse and neglect.[9] Amicus contends that the stakes are just as high, if not higher, for a child in a child abuse adjudication as for a child in the criminal courts. Implicitly recognizing the guardian ad litem's argument, the Supreme Court of West Virginia held that children in dependency proceedings were not merely entitled to counsel at every state of a child abuse adjudication, but were entitled to effective assistance of counsel.

Further, the informality condemned in In re Gault was indeed present and abused here. In fact, Petitioner's "hearing" was so informal that no transcripts were made, none of the medical evidence establishing her sexual abuse was introduced into the record, no witnesses were called, her maternal relatives were not given notice, and a state court judge made a real investigation impossible. The situation was exacerbated by the fact that child abuse adjudications are not open to the public. Therefore, any party sincerely interested in helping Petitioner would not have known that she needed legal assistance. Petitioner needed an

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[8] See Petitioner's Memorandum of Law at 10, In re Jeffrey R.L., ___ W.Vir. __, 435 S.E.2d 162 (1993).

[9] See Mosteller, Robert P., Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 Duke L.J. 203, 203-205 (1992).

advocate dedicated to her interests, especially at the disposition stage--but she had none.

B. Children in Child Abuse Proceedings Often Receive Incompetent Legal Representation.

Most commentators today agree that children in child abuse adjudications must be represented by independent counsel.[10] As the ABA Presidential Working Group has stated:

> "Meaningful protection of children's rights requires that children be represented by highly skilled counsel at critical stages of critical proceedings. Competent professional representation in proceedings that involve children is vital in a system where decisions about children's rights and liberties...are decided."[11]

Despite the critical importance of counsel, not every state requires that children in child abuse adjudications be appointed an attorney. One commentator has noted that prior to 1967 typically fewer than 10% (and often fewer than 5%) of the children before the juvenile court received legal counsel.[12] Today the Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-

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[10] See IJA-ABA Standards for Juvenile Justice, Counsel for Private Parties 1.1, 2.3(b) (1980); ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families, America's Children at Risk, 7, 51, 86 (1993) (hereinafter "ABA Presidential Working Group") (advocating adoption of ABA Standards Relating to Private Parties and adopting position that children should have legal representation at all stages of child abuse proceedings); Duquette, Donald N. and Ramsey, Sarah H., Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation, 20 J. of Law Reform 341, 346 (1987); Haralambie, Ann M., The Child's Attorney, A Guide to Representing Children in Custody, Adoption and Protection Cases, Family Law Section of ABA, 1, 258 (1993) (setting forth introductory comments of New York Law Guardian Representation Standards in Child Protective Proceedings, Termination of Parental Rights Proceedings, and Foster Care Placement and Review Proceeding); See generally, Note, California Welfare and Institutions Code Section 317: Advocating a Change to Require Independent Counsel for all Children, 23 Loy.L.A.L.Rev. 1385 (1990).

[11] ABA Presidential Working Group at 7.

[12] IJA-ABA Juvenile Justice Standards at 1.

5106 (hereinafter "the Act"), condition a state's receipt of federal funds on the state fulfilling a number of conditions, including appointment of a guardian ad litem (herein-after "GAL") for every child in abuse adjudications.[13] The Act does not, however, require that the guardian ad litem be an attorney.

Further, a 1990 survey indicates that despite federal statutory requirements, less than 100% of all children receive GAL representation in 26 states.[14] In six of these states less than 70% of the children are represented. The GAL Survey reported that in Florida 49% of the children are represented, in Nevada 32%, and in Delaware only 22% of the children in abuse proceedings receive GAL representation.[15] State laws in 8 of the 26 states do not require a GAL to be appointed in all cases. In addition, the GAL Survey found little consistency between or within the states as to who is to serve as the GAL, what the GAL's responsibilities are, and how conflicts are to be resolved. For instance, only 19 states and the District of Columbia have statutes which say that the GAL must be an attorney. Only five states were found to have a comprehensive description of the role and responsibilities of the GAL. The responsibilities of the GAL in most other cases are broadly defined with no specific direction as to what constitutes minimal required effort on behalf of the child. Only 8 states, the District of Columbia and a small number of local jurisdictions have training for attorney GALs. The GAL survey also found that the majority of attorney GALs do not specialize in family law. According to the GAL Survey, "...this lack of training is conspicuous" (id. at 42) and "[u]ltimately, the lack of clear

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[13] See 42 U.S.C. §5103(b)(2)(G).

[14] See Administration For Children, Youth and Families, Office of Human Development Services, U.S. Department of Health and Human Services, National Guardian Ad Litem Representation at 41 (Oct. 1990) (hereinafter "GAL Survey"). The information in this paragraph is either paraphrased or taken directly from the GAL Survey.

[15] GAL Survey at 11-12.

guidelines for responsibilities can lead to inadequate representation for the child." Id. at 44.

The GAL Survey's concerns about adequate representation for children in child abuse proceedings are well founded. As the ABA Presidential Working Group reported:

> "We have heard frequent allegations that some attorneys fail to meet with clients in advance of court proceedings, are not prepared for hearings and even disregard the express wishes of their clients. This kind of representation--where it occurs--is unacceptable and certainly would not be tolerated where the client was an adult able to pay the attorney's bills. Children's cases are often 'processed,'not advocated, and too frequently children's interests are poorly represented."[16]

A number of commentators have documented the inadequate representation that children before the juvenile court too often receive.[17] For instance, an analysis of the New York State Bar Association Law Guardian Study (hereinafter "Law Guardian Study") presents a shocking picture. The Law Guardian Study conducted interviews, engaged in courtroom observation and examined completed case files in 14 counties to determine the

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[16] ABA Presidential Working Group at 7.

[17] See Sobie, Merril, The Representation of Children: A Summary and Analysis of the Bar Association Law Guardian Study, New York State Bar Journal (Feb. 1985); ABA Presidential Working Group at 7; Kelly, Robert F. and Ramsey, Sarah H., Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children, 40 Rutgers L.Rev. 1217 (1988) (hereinafter "Kelly and Ramsey"); In re Jeffrey R. L., ___W.Vir. ____, _____ S.E.2d____ (1993) (citing both New York Law Guardian study and North Carolina study for support of holding requiring that children be afforded effective assistance of counsel at all stages of a child abuse adjudication); Haralambie, Ann M., The Child's Attorney--A Guide to Representing Children in Custody, Adoption, and Protection Cases, xi-xii (Family Law Section of ABA 1993) (forward by Howard Davidson, Director of the ABA Center on Children and the Law discussing "horrendous examples of attorney malpractice--indeed, child clients treated with a complete lack of dignity and respect").

quality of the representation of children before the juvenile court. The Law Guardian Study found:

1. 45 percent of the courtroom observations reflected either seriously inadequate or marginally adequate representation, 27% were found to reflect acceptable standards of representation and only 4 percent evidenced effective representation.

2. Almost 1/2 of the proceedings for which complete transcripts were analyzed revealed apparent appealable errors on the part of the law guardian or the judge. Yet less than 1 in 600 cases are appealed.

3. In 1/2 the proceedings it appeared that the law guardian had accomplished little or no preparation prior to entering an admission or otherwise disposing of the case.

4. In several cases the law guardian had not even met with the child client prior to the hearing.

5. A complete absence of class action suits or special litigation (clearly one of the few ways if not the only effective way to create systemic change).

6. A staggering case load (in one major county each full-time law guardian represents over 800 separate children/year) which precluded the realistic probability of effective representation.

Another study performed in North Carolina found that experienced attorneys who worked long hours, were deeply involved in the negotiations and the factfinding processes, and who actually communicated with their clients were able to influence the outcomes of their cases in a manner judged beneficial by the study.[18] Unfortunately, most North Carolina attorneys did little or nothing in representing their child clients.

Both the Law Guardian Study and the study performed in North Carolina noted that reasons which contributed to the poor representation of children included a lack of guidance as to the proper role of the attorney, a lack of specialized training in child abuse and child development, a lack of monetary incentives, and a lack of respect from juvenile court judges. Both studies

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[18] See Kelly and Ramsey at 1238-1239.

underscored the importance of establishing practice guidelines for lawyers who represent children. This latter factor was recognized by the West Virginia Supreme Court in In re Jeffrey R.L., supra, which, as part of the court's opinion, formally adopted practice guidelines for attorneys representing children.

The importance of practice guidelines to aid the attorney in determining what is "effective representation" for children cannot be overstated, largely because there is so little systemic control over the quality of representation rendered by juvenile court practitioners. There are a number of reasons for this problem. One reason is that judges do not ensure that children receive meaningful representation. One commentator has suggested that judges do not respond forcefully in the face of incompetent representation because of the absence of a constitutional right to effective assistance of counsel.[19] Further, the child itself cannot control the attorney; the child doesn't know what constitutes meaningful representation and may not know that the lawyer is incompetent or inadequate. Therefore, the child is not able to file a complaint with the state bar or pursue a civil action for malpractice.[20] This situation is exacerbated by the fact that child abuse adjudications are not open to public scrutiny. Thus, it is highly unlikely that a third party could come to the aid of a child before the juvenile court. Consequently, monitoring juvenile court attorneys is critical. As a first step, however, most of the commentators cited have urged the adoption of practice guidelines clearly setting forth the responsibilities and duties of attorneys representing children.

Although not every set of guidelines sets forth identical criteria, most agree that the attorney must, at a minimum:

1. Confer with the client without delay and as often as necessary;

2. Conduct a prompt investigation;

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[19] See Schwarzer, William W., Dealing with Incompetent Counsel--The Trial Judge's Role, 93 Harv.L.Rev.633, 666 (1980).

[20] See Kelly and Ramsey at 1250.

3. Advise the client in terms the client can understand;

4. Make all motions, objections or requests necessary to protect the client's rights;

5. Conduct discovery;

6. Present and examine witnesses;

7. Advise the client of the right to appeal and file an appeal if in the client's interests (unless new counsel is substituted by the court).[21]

Applying these guidelines to the current case it becomes clear that Chrissy never had any meaningful representation. The guardian ad litems appointed to represent Chrissy never conducted an investigation, never brought any of the doctors' reports establishing that Chrissy had been sexually abused into evidence, never attempted to independently obtain any evidence regarding the sexual abuse prior to the hearing, failed to review any of the documents contained in the court file for the Singley-Foxworth divorce proceeding, and never filed an appeal. 780 F.Supp. at 1114. Moreover, the guardian ad litem's never objected to the manner in which the hearing was conducted. Thus, the guardian ad litems did basically nothing but sit in attendance as the state court commissioner, not unsurprisingly, ruled that Chrissy would remain in her paternal grandmother's home with unrestricted access to her by her father. This case amply illustrates the importance of counsel to children in child abuse adjudications.

Amicus fears that if Chrissy III is allowed to stand, abused children who are the victims of procedural due process violations and ineffective assistance of counsel will be effectively barred

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[21] The following rules appear in IJA-ABA Joint Commission on Juvenile Justice Standards, Standards Relating to Counsel for Private Parties (1980); National Association of Counsel for Children, Suggested Guidelines for the Guardian Ad Litem (1977); New York Law Guardian Representation Standards in Child Protective Proceedings, Termination of Parental Rights Proceedings, and Foster Care Placement and Review Proceedings, Adopted by the New York State Bar Association's Committee on Juvenile Justice and Child Welfare; Bay Area Reasonable Efforts Project, Practice Guidelines for Attorneys Practicing Dependency Law in Alameda, San Francisco, and Santa Clara Counties (1989, updated 1992).

from having their constitutional claims heard in either state or federal court. It should be emphasized that child abuse victims can seek legal protection only in state court proceedings--either in a custody and divorce case or a juvenile court abuse adjudication. Thus, most seriously abused children will probably be involved in a state proceeding of some kind. Accordingly, situations such as the one at bar are capable of repetition over and over. Where the child has not been meaningfully represented, a fact not at all uncommon in the juvenile courts today as the above discussion demonstrates, he/she will not be able to assert her constitutional claims in state court. Yet, under Chrissy III, if she then attempts to file suit in federal court alleging her constitutional claims, the court will hold that she should have raised those issues in state court despite the fact that the child was incapable of asserting those claims. This case illustrates the essential problem with the Chrissy III decision: a five year old cannot speak for herself--she is incapable of instructing her attorney to allege her constitutional claims or to take remedial legal action. What exactly the Fifth Circuit expected Chrissy to do in this situation is unclear. It appears fairly obvious that a five-year-old child could do nothing to protect herself. Chrissy's situation was compounded by the fact the hearing was held in secret with no notice to her maternal grandparents. Thus, there was no one who could have known what had happened and rendered legal assistance. Consequently, without competent counsel, Chrissy was completely helpless to challenge a judge who was determined to prevent a meaningful hearing. Amicus submits, therefore, that this child was denied her federally protected constitutional right to access to the courts. Amicus further urges this Court to grant the Petition to confirm that where a state statute provides for appointment of counsel for children in child abuse proceedings, those children are entitled to effective assistance of counsel.

CONCLUSION

For the reasons stated herein, this Court should grant the petition.

Respectfully submitted,

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Dated: Filed as of December 8, 1993

AMICUS CURIAE

BRIEF

MOTION FILED
DEC 16 1993

NO. 93-754

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CHRISSY F., By Her Next Friend And
Guardian AdLitem, DONNA MEDLEY,
Petitioner,

vs.

SEBE DALE, JR., Individually And As Chancellor For
The Tenth Chancery Court District of Mississippi,
GARLAND UPTON,
Individually and as Referee of the
Marion County Youth Court,
PHILLIP BROADHEAD and FRED COOPER,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Alliance for the Rights of Children and the National Center for Protective Parents hereby move for leave to file the brief for amicus curiae pursuant to Rule 37 of the Rules of Court. The petitioners have consented to the filing; counsel for the respondents have not consented.

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TABLE OF CONTENTS

	Pages
TABLE OF CONTENTS	
TABLE OF AUTHORITIES . . .	
STATEMENTS OF INTEREST OF THE AMICI CURIAE .	
ISSUES PRESENTED	
SUMMARY OF THE ARGUMENT . .	
ARGUMENT	
I. JURISDICTION. . .	1
II. MEANINGFUL ACCESS TO COURTS . . .	8
CONCLUSION	12

TABLE OF AUTHORITIES

	Pages
Ankenbrandt v. Richards, ___ U.S. ___, 112 S. Ct. 2206 (1992)	4
Chicago Life Insurance Co. v. Cherry, 244 U.S. 25, 37 S.Ct. 492 (1926)	8
Hazel-Atlas Glass Co. v. Hartford-Empire Company 322 U.S. 238 (1944)	6
Nelson v. United States (9th Cir. 1948) 169 F.2d 833	7
Sunshine Anthracite Coal Co v. Adkins 310 U.S. 381, 60 S.Ct. 907 (1963)	7
Washington Bridge Co., v. Stewart 44 U.S. (3 How.) 413 [11 L.Ed. 658]	5, 6

National Center For Protective Parents
In Civil Child Sexual Abuse Cases

1906 Riverside Drive • Trenton NJ 08618 • 609 394 1506 • Fax 609 394 2574

STATEMENT OF INTEREST

The National Center for Protective Parents, Inc. is a privately and state-funded, not-for-profit, tax-exempt national resource center, formed for the purpose of researching the causes for the system's failure to protect children from incest, and to remedy the situation whenever possible. In the process of carrying out this function, the NCPP has compiled a great deal of specialized information about incest cases, which would ordinarily not be available to the courts.

I have read all briefs submitted by the parties and offer this Amicus Curiae Brief in order to provide additional information which has not been provided in the briefs of the parties.

As a resource center, the NCPP offers parents assistance ranging from a simple referral for evaluation, to providing a free training program for attorneys which results in pro bono representation for indigent parents. A major goal of the Center is to convince parents to seek justice within the system, instead of running and hiding.

12/6/93
Date

Executive Director

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ARCH

STATEMENT OF INTEREST

The Alliance for the Rights of Children (ARCH) is a privately funded, non-profit, tax-exempt corporation formed for the purpose of providing support to child victims of sexual abuse and their protective caretakers (parents, grandparents, relatives). ARCH is a national alliance of child advocacy organizations, organizations fighting domestic violence, church and service organizations, as well as individual professionals and citizens who are concerned with the escalation of violence against children in our society and the lack of adequate legal protection for them and their caretakers. ARCH provides a referral system, a telephone helpline, educational and informational materials and emotional support. We also "track" specific cases all over the U.S. to

determine how the courts in each state are handling cases of reported abuse.

ARCH is particularly interested in the Chrissy Foxworth case because its outcome will impact thousands of cases throughout the country: A parent re-ports suspected sexual abuse of her child, medical and psychological experts confirm the abuse, but the court disregards the evidence and accuses the mother of making false allegations and of brainwashing the child, the alleged abuser gets unsupervised or no visits. The protective parent has limited choices: She can hide her child and go to jail, as did Dr. Elizabeth Morgan; she can go into hiding with her child (unfortunately Chrissy Foxworth's mother died while she and her child were in hiding), or she can comply with the judge's order and send her child into what amounts to court-ordered rape of her child.

Glennie Rohelier 12/6/93

Glennie Rohelier, President Date
Alliance for the Rights of Children

ISSUES PRESENTED

1. Whether the federal district court lacks subject matter jurisdiction to hear the civil rights claims of an abused child that the child welfare investigative procedures and the Youth Court proceedings mandated for her protection by the Constitution of the United States and the Child Abuse Prevention and Treatment Act (42 USC 5101 et seq.) were violated by Mississippi state judicial officers on the grounds that her claims were "inextricably intertwined" with the state court custody proceedings?

2. Whether the existing Mississippi state statutes and procedures provided adequate due process protections to this child such that any violations of her rights could be review by the Mississippi state courts?

SUMMARY OF ARGUMENT

Chrissy F. was returned to the State of Mississippi from the protective custody of the California Juvenile Court, and the home of her foster mother, DONNA MEDLEY, upon the agreement by Chancellor Sebe Dale, Jr. that she would be afforded a competent and fair hearing of her allegations of sexual abuse by her father in the Youth Court of Mississippi. In fact, once she returned to Mississippi, Chrissy's rights to access to courts, to due process, to representation by an independent attorney and/or guardian ad litem, were trammeled in a sham proceeding that even the Fifth Circuit acknowledged violated her rights.

There have been three opinions by the Fifth Circuit in this case; Chrissy I, issued September 11, 1989, reversed the district court's initial order dismissing the case for lack of federal subject matter jurisdiction; Chrissy II was an interim appeal of the trial court's preliminary orders regarding immunity defenses of several defendants, and Chrissy III, issued July 7, 1993, reviewing the judgment after trial in the district court. Nevertheless, despite two previous reviews, the last panel of the Fifth Circuit held that federal subject matter jurisdiction was improper, and rendered a decision for the defendants.

Amici urge that there is indeed federal jurisdiction over constitutional and statutory claims such as Chrissy's, and further, that the jurisdiction, which cannot be unilaterally reversed by a subsequent panel of the same court.

Amici also urge that for children like Chrissy whose only legal protections were those given her by the officers of the State court proceedings which violated her rights, she cannot rely on state proceedings to vindicate those same rights. The core of society's protective scheme for abused children is access to welfare and youth court proceedings; if a child is denied meaningful access to those proceedings, she has no protection at all.

I

JURISDICTION

The Fifth's Circuit's opinion, wherein Justice Jones claims that the Court had never really determined that subject matter jurisdiction existed in its two previous decision, runs counter to the Constitutional precept of Article III. The Courts must have before them an actual case or controversy and will not render an "advisory" opinion; yet Justice's Jones' opinion holds that the Fifth Circuit decision in 1989 was solely a discussion of party standing/representation and the 1991 decision was an academic discussion of the state of federal law regarding governmental immunities. Thus, the Fifth Circuit concludes that not only did the District Court labor over this case for 4 years, but the Fifth Circuit worked on it in 1989 and 1991 without any need to do so.

In August 1988, Judge Barbour summarily dismissed the entire action on the ground that there was not federal subject matter jurisdiction. This dismissal was appealed by the plaintiff and the issue was extensively briefed and argued in the Fifth Circuit. The defendants raised an inquiry about the status of Ms. Medley which had NOT been raised or ruled upon in the District court and therefore was clearly not an issue on appeal before the Fifth Circuit.

In its decision of 1989, (reproduced at p. A-9 of Appendix to Petition for Writ of Certiorari) the Fifth

Circuit panel acknowledged that the issue before it was federal subject matter jurisdiction. The Court held that the "primary concern on remand should be to assure that Chrissy's interest in vindicating her statutory and constitutional rights are properly protected," and reversed the lower court's ruling on jurisdiction. The panel's discussion about possible issues concerning the appropriateness of the guardian ad litem – and it is important to note that the Court specifically advised it was not ruling on Ms. Medley's status – correctly suggests that when the matter is remanded, it is within the trial court's discretion to determine who should represent Chrissy's needs. If the first panel had not concluded that the District Court had jurisdiction, there was no authority to remand the matter for a consideration of appointment of a guardian ad litem, or anything else.

The Fifth Circuit, in its second opinion, issued March 8, 1991, (at p. A-13 of Appendix to Petition for Writ of Certiorari) ruled on issues of immunity raised by several defendants, clearing the way for the case to proceed to trial.

Immunity is granted to certain judicial actors, in part, to protect their time from being needlessly consumed in improper litigation. Immunity issues have priority for that very reason, so that judicial officers can return to their duties. But immunity does

not become an issue unless and until it has been established that the court has jurisdiction to go forward. Clearly the district court, having been directed by the reversal of its 1989 dismissal, went forward in preparation of the trial. If the Fifth Circuit, finding for the plaintiffs in its second opinion as it did, still wanted to avoid a meritless trial, it could have concluded at that time that the Court lacked subject matter jurisdiction. It did not. In fact, the opinion spoke with a clear and compelling voice for the adjudication of the alleged constitutional violations:

> "If the allegations of the complaint are proved, the state-official defendants violated at least some of Chrissy's clearly established constitutional rights, and we therefore affirm the denial of the motion to dismiss..." [USCA, Fifth Circuit,#90-1332, at 2670]
>
> "The alleged acts of the defendants from whom damages are sought would, if proved, constitute a violation of Chrissy's clearly established right to access to the Mississippi Youth Court. Meaningful access to the courts is a fundamental constitutional right, grounded in the First Amendment right to petition and the Fifth and Fourteenth Amendment due process clauses."
>
> "In her complaint, Chrissy also alleges violation of a clearly established

> Fourteenth Amendment right to protection from the deprivation of her liberty interest in not being abused. The nature of the liberty interest safeguarded by the Fourteenth Amendment, like that of the property interest, is defined at least in part by state law Chrissy's claim is not, therefore, merely one for enforcement of state law but for the enforcement of a federal constitutional right even though the protected liberty right is defined by state law." [USCA Fifth Circuit, #90-1332, at 2677]

The time-worn precept that subject matter jurisdiction can be raised at any time must have some logical limits. Two panels of the Fifth Circuit realized that this case was NOT about custody of Chrissy, nor a review of the Chancery Court's ruling in her parents divorce. This case is about the right of an abused child to have the protections of due process and the courts, rights which are proclaimed by the United States Constitution, the federal Child Abuse Prevention and Treatment Act, and the Civil Rights Acts of 1873, but which are rendered virtually useless by the 1993 decision saying that she cannot seek to enforce them in the federal courts.

In 1992, this Court reviewed the "domestic relations" exception to federal court jurisdiction in Ankenbrandt v. Richards, – U.S. –, 112 S.Ct. 2206 (1992) and held that jurisdiction remains for cases, even

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among parents and children, which seek remedies other than straight-forward decrees of divorce, support, or custody. Similarly, Chrissy's case is not a custody claim against her father: it is against the social welfare and judicial processes which failed her.

The final Fifth Circuit opinion in Chrissy's case should also be reviewed because it has erroneously overlooked the law of the case and called into question jurisdictional issues ruled upon in 1989.

Where a question of law once determined is sought to be re-itigated upon a second appeal to the same appellate court, it is well settled that the first determination is the law of the case and, absent circumstances leading to a miscarriage of justice, will not be re-examined. The principle holds even if the issue sought to be re litigated is the subject matter jurisdiction of the court in the first appeal. As the Court said as early as Washington Bridge Co. v. Stewart, 44 U.S. (3 How.) 413 [11 L.Ed. 658]): "After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal."

"Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. Branson v. Schulten, 104 U.S. 410, 26 L.Ed.797. This salutary general rule springs from the belief that in

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most instances society is best served by putting an end to litigation after a case has been tried and judgment entered." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 [64 S.Ct. 997, 1000, 88 L.Ed. 1250] (1944).

"The Hazel-Atlas Glass Co. case. . . restates the holdings in a long line of cases that a [federal] court, after the term has expired, has not the power to set aside a judgment wrongly concluding as a matter of law that the facts shown in the record conferred jurisdiction, and this although the question of the absence of jurisdiction was not raised in the trial or appellate courts assuming it. Among such cases are Washington Bridge Co. v. Stewart, 3 How. 413, 423, 11 L.Ed. 658...where on a second appeal the Supreme Court refused to entertain a motion to set aside its decision of a first appeal which had been taken from a non-appealable interlocutory order, a fact not called to its attention on the first appeal," Nelson v. United States (9th Circ. 1948) 169 F.2d 833, 835.

"The suggestion that the doctrine of res judicata does not apply unless the court rendering the judgment had jurisdiction of the cause is sufficiently answered by Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 and Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85.. As held in those cases, in general the principles of res judicata apply to questions of

jurisdiction as well as to other matters whether it be jurisdiction of the subject matter or of the parties."(Sunshine Anthracite Coal Co. v. Adkins., 310 U.S. 381, 403, 60 S.Ct 907, 917, 984 L.Ed. 1263.)

"Whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. Cromwell v. County of Sacramento, 94 U.S. 351, 352, 24 L.Ed. 195; Grubb v. Public Utilities Commission, 281 U.S. 351, 352, 24 L.Ed. 195; Grubb v. Public Utilities Commission, 281 U.S. 470, 479, 50 S.Ct. 374, 378, 74 L.Ed. 972; Chicot County Drainwage District v. Baxter State Bank [308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329]." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 494, 503, [61 S.Ct. 326, 330; 85 L.Ed. 297] (1963)

Thus, while the Fifth Circuit, in its 1989 opinion did not extensively discuss its reasoning, by reversing the dismissal on grounds of subject matter jurisdiction, it clearly held that there was jurisdiction in the federal courts. In reversing the order of dismissal and remanding for further proceedings consistent with its opinion, and even suggesting that there should be judicial inquiry into the status of the guardian ad litem, the Court tacitly found that there would be further proceedings and hence that subject matter jurisdiction existed in the cause.

"A court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over that defendant." Chicago Life Ins. Co. v. Cherry, 244U.S. 25, 29 [37 S.Ct., 492, 493] (1926). The Fifth Circuit court in 1989, reversing the order of dismissal and remanding for further proceedings consistent with its opinion, and even suggesting that there should be judicial inquiry into the status of the guardian ad litem, tacitly found that there would be further proceedings and hence that subject matter jurisdiction existed in the cause.

II
MEANINGFUL ACCESS TO COURT

The Fifth Circuit suggested that any federal claims which Chrissy, a seven year old child, might have against the state of Mississippi officials, should have been raisedby her in the state court proceedings.

While that precept of judicial efficiency is appropriate in some disputes, when the core claim of the child is the fundamental unfairness of the state proceeding itself, efficiency is a useless direction. IF the child's complaint is that her court-appointed guardians ad litem did not adequately represent her in the state court proceeidngs, if her father has been given custody, her mother is dead, and her maternal relatives haven't even been notified about the hearing, WHO is it who will even advise her of her right to appeal? Who will

tell the child that she can raise her claims of constitutional violations in the courts of Mississippi?

If Chrissy had been appointed an attorney or guardian ad litem by the Chancery Court in 1987, if Chrissy had had the benefit of a competent and complete DPW child-abuse investigation by Hancock County in 1986, if the Mississippi officials had complied with the agreement with the California juvenile court in 1987, if the California court had been afforded co-operation and been allowed to contribute to the investigations and proceedings in the Mississippi Youth Court in December 1987, if Chrissy's maternal grandparents and relatives had received notice of the proceedings and had been afforded the opportunity to present evidence and participate, if Chrissy had an independent attorney appointed for her in the Youth Court who would have presented evidence, talked to witnesses, and insisted upon record, then perhaps the Court could say that her interests had been adequately protected

However, the Fifth Circuit is in error believing that Ms. Medley was ever involved, noticed or participated in the state court proceedings in Mississippi. Indeed, no one from the California courts or child welfare department were even advised of the Youth Court proceedings in Mississippi until a newspaper story reciting the Chancery Court custody decision was published on January 4, 1988.

And herein lies the fundamental wrong in this case. The State of Mississippi through its judicial officers, took away from Chrissy every protection that her family and our society afforded to her; and then, did not protect her.

Time and again, Chrissy was refused an attorney: even after her mother died, Judge Dale refused to appoint a guardian ad litem for her, and refused her maternal great grandmother's attempt to pursue an appeal on her mother's behalf. Judge Dale stopped the child/abuse investigation in Hancock County in 1986; he stopped it again in 1987 when Chrissy was returned from California. He instructed the psychologist and social workers not to discuss abuse with her; he ordered evaluations of Chrissy without the knowledge of her court-appointed guardians ad litem. (In fact, Judge Dale did not believe Chrissy should have an independent advocate: he testified that he regarded himself as the child's "Super-Guardian", and believed he should hold the total authority over her custody.)

In order to bring Chrissy back to Mississippi, the California Court forced Dale to agree to secure a child welfare abuse investigation and to initiate appropriate Youth Court proceedings intended to provide Chrissy a fair judicial hearing.

Yet once Chrissy was returned to Mississippi, Judge Dale issued orders concerning medical/psychiatric evaluations and temporary

custody without the guardians ad litem's knowledge: he reviewed those reports without notice to the guardians ad litem or family. Judge Dale allowed a taped interview of Chrissy without adequate protections and without notice to her guardians ad litem, by the same local district attorney who testified that although Chrissy's father, Tim Foxworth, had lied on his polygraph exam, he had not so advised the Court because he believed it to be insignificant. Dale appointed Garland Upton as referee to conduct the Youth Court proceedings, even though Upton had been Tim Foxworth's attorney in a previous divorce. Referee Upton conducted "hearings" without declaring this conflict, without adequate notice to the parties, without a reporter present, and without any sworn testimony or evidence. None of the medical reports documenting Chrissy's sexual abuse by her father were even introduced into evidence; in fact, no decision was actually ever rendered. Upton "remanded the case to the files"; four days later, Judge Dale, as Chancellor, issued his "final" Chancery order leaving Chrissy in the custody of her father .

If Chrissy had had a truly independent attorney and a guardian ad litem, wouldn't that guardian have assured that Chrissy's other relatives be notified of the proceedings? Wouldn't s/he have communicated with the social workers and professionals who had examined Chrissy?

Wouldn't s/he have assured that the child

Wouldn't s/he have assured that the child welfare investigations in Mississippi and California were co-ordinated and presented to the Court? Wouldn't the numerous medical and psychology reports dating all the way back to 1986 have been admitted into evidence? Wouldn't a guardian ad litem insist on a record? Insist on a decision?

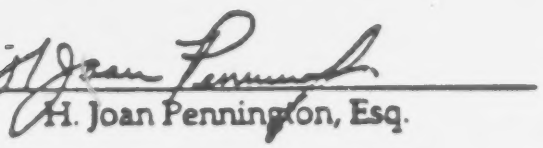
Yet the Fifth Circuit holds that Chrissy -- the child -- should have raised her complaint about the fundamental unfairness of these proceedings, in the very same proceedings. And that the federal courts are not available to her to secure her due process rights.

CONCLUSION

Amici urge the Court to understand that there is a fundamental miscarriage of justice in the Fifth Circuit's decision and issue the Writ of Certiorari to the Fifth Circuit in this case.

December 8, 1993

Respectfully submitted,
ALLIANCE FOR THE RIGHTS OF CHILDREN
THE NATIONAL CENTER FOR PROTECTIVE PARENTS

by 
H. Joan Pennington, Esq.